

1937

A history of the county court in Virginia

D S. Rubenstein

Follow this and additional works at: <https://scholarship.richmond.edu/honors-theses>



Part of the [History Commons](#)

Recommended Citation

Rubenstein, D S., "A history of the county court in Virginia" (1937). *Honors Theses*. 1087.
<https://scholarship.richmond.edu/honors-theses/1087>

This Thesis is brought to you for free and open access by the Student Research at UR Scholarship Repository. It has been accepted for inclusion in Honors Theses by an authorized administrator of UR Scholarship Repository. For more information, please contact scholarshiprepository@richmond.edu.

A History of the County Court in Virginia

TABLE OF CONTENTS

Chapter I - The County Court as a Colonial Institution
1619 - 1775.

Chapter II - The County Court as a State Institution
1776 - 1866.

Chapter III - The Passing of the County Court
1867 - 1902.

I. The County Court as a Colonial Institution.

It is by no means an exaggeration to say that the County Court is among the most colorful institutions in Virginia history. Coming into existence a few years after the birth of the colony, it remained almost unchanged in its general character up until the time of the Civil War. Not only was it the keystone about which the administration of local justice was built, but it possessed important legislative and executive functions. At the same time, it was inextricably bound to the social and educational life of the community. Thus, it immediately becomes evident that a complete narration of all the varied phases of the County Court history is a task which would easily require several volumes. Even an adequate summary of all the statutory enactments relating to the jurisdiction of the court is beyond the scope of this discussion. I shall endeavor to confine myself, for the most part, to a review of the constitutional development - perhaps the constitutional disintegration - of the County Court from its earliest beginnings down to its abolition at the Constitutional Convention of 1902.

The origin of the County Court in Virginia may be traced back to the administration of the Virginia Company.

Known as a "monthly court," it was created by a civil ordinance of 1618, for the purpose of giving a measure of self-government to the colonists.¹ During the following year, Governor Yeardley put this ordinance into effect, so that it provided for the establishment of courts for the redress of relatively small and unimportant cases; cases of greater consequence were left to the jurisdiction of the Quarter or General Court, which was composed of the governor and his council.²

Although these courts were to develop into the County Courts, the county itself had not yet come into existence. Each court was held in a "precinct," which probably consisted of a group of two or more plantations.³ In acts of 1623-24 it was provided that courts be held each month in the corporations of Elizabeth City and Charles City.⁴ The primary purpose was economy; there was considerable saving of time and expense by bringing justice within easier reach of the colonist. There had been rapid growth in Virginia since 1619, and the creation of these courts was a natural consequence. Many of the colonists lived a long way from the Quarter Court at James City, and they found it exceedingly inconvenient to traverse the distance for the purpose of settling minor disputes. As a result, the first two courts were set up on widely separated frontiers.⁵

1. Margaret McMillen, The County Courts of Colonial Virginia, p.1.

2. Ibid.

3. Ibid.

4. Ibid.

5. O. P. Chitwood, "Justice in Colonial Virginia." Johns Hopkins University Studies in Historical and Political Science, Vol. XXIII, No. 7-8, p. 74.

There is evidence to substantiate the possibility that these two courts were established as early as 1619, and that the legislation of 1623-24 was simply statutory recognition of an accomplished fact.^{6.}

Not only was the jurisdiction of the early County Courts limited to petty cases, but each court was restricted to cases coming up from precincts in its immediate vicinity. As a consequence, the judicial authority of the governor and his council over a considerable part of the colony was left unimpaired.^{7.} By 1632, however, three additional courts had been created, one of them east of Chesapeake Bay.^{8.}

In 1634, the colony was divided into eight shires, and it was provided that a court be held in each of them every month.^{9.} The courts acquired the name of "courts of shire,"^{10.} and were eventually known as County Courts. Additional counties were organized from time to time, and each of these was always provided with its local court. In 1658, there were sixteen counties in Virginia; there were twenty-five by 1714, and in 1782 the total was seventy-four.^{11.}

An act of 1624 had provided that the judges of the monthly courts should be "...the commanders of the places and such others as the governor and the council shall ap-

6. Ibid.

7. Ibid.

8. Ibid., p.75.

9. Ibid.

10. McMillen, The County Courts of Colonial Virginia, p. 2.

11. Chitwood, "Justice in Colonial Virginia," p. 75.

McMillen, op. cit., p. 2

point by commission." ¹². Before long, these commissioners came to be known as justices of the peace. At a very early date the council had already acquired the inclination to approve the governor's choices without much question. At the same time, the appointments made by the governor had begun to be strongly influenced by the justices already in office.¹³ It was naturally the desire of the governors to fill county offices with sympathizers, but there is little evidence to indicate that the appointive power was abused. A reasonably competent justice, who deserved his commission, and who carried out his duties to the satisfaction of his colleagues, was almost invariably allowed to remain in office.¹⁴ The office came to be recognized as one of dignity, and it was generally occupied by a man of influence and more than average ability. Few of the earlier justices were learned in the law, it is true, and many had only very limited educations; but the cases they were called upon to decide seldom involved difficult points of law. A man with sound judgment and a generous portion of common sense was capable of holding down the job in a satisfactory manner.¹⁵

At the beginning of the Commonwealth period, it was ordered that the justices be chosen not by the governor but by the House of Burgesses.¹⁶ This provision was repealed, however in the following year (1653), when the governor and

¹². Ibid., citing Henning, Statutes, Vol. I, p. 25.

¹³. McMillen, The County Courts of Colonial Virginia, p. 3.

¹⁴. Ibid., p. 4.

¹⁵. Chitwood, "Justice in Colonial Virginia," p. 75.

¹⁶. Ibid., p. 76.

council were given power to appoint commissioners on the express recommendation of the County Courts.^{17.} In 1658 it was provided that appointments so made be confirmed by the Assembly.^{18.} It is evident then that the courts had only a doubtful responsibility to the people, who possessed practically no control over appointments. Justices were not chosen for any definite period of time; their commissions could be renewed indeterminately at the discretion of the governor. For all practical purposes, the vast majority of appointments were virtually for life.^{19.}

During the remainder of the colonial period, the justices continued to receive their commissions from the governor; the advice and consent of the council was sometimes required.^{20.} The governor did not always feel that it was necessary to follow the recommendations of the existing court in selecting new justices. The justices were exceedingly jealous of what they now considered to be a prerogative, and occasionally voiced strenuous protests.^{21.} In later years they were successful in fully reviving this privilege of making nominations for vacancies. The County Court thus became largely a self-perpetuating body, with almost complete independence of executive authority. The justices were becoming the most influential figures in local politics, and the governors were justly cautious

17. Ibid.

18. Ibid.

19. Ibid.

20. Ibid.

21. Edward Ingle, "Local Institutions of Virginia." Johns Hopkins University Studies in Historical and Political Science, Vol. III, No. 2-3, p. 89.

about antagonizing them.²² The justices were undoubtedly justified in setting up high standards for admission to their group. There was no monetary compensation involved, prestige being the only thing which made the office desirable. It would not do to admit any but the most select candidates, if that prestige was to be maintained.²³

The colonial court always insisted upon the utmost dignity and sobriety on the part of those present, particularly its own members. One early statute read as follows: "... that whatsoever justice of the peace shall become soe notoriously scandalous upon court dayes at the court-house, to be soe farre overtaken in drinke that by reason thereof he shalbe adjudged by the justices holding the court to be incapable of that high office and place of trust, proper to inherett in a justice of the peace, shall for his first such offence be fined five hundred pounds of tobacco and cask, and for his second offence one thousand pounds of tobacco." ²⁴. A further offense was to be punishable by a still larger fine and by removal from office.²⁵

In a similar fashion, the court strongly objected to interruptions, and demanded proper procedure. At a session of one particular court, the justices were in a quandary about how to deal with a venerable old lawyer who had

22. Chitwood, "Justice in Colonial Virginia," p. 77.

23. Ingle, "Local Institutions of Virginia," p. 90.

24. Ibid., p. 95, citing Virginia Historical Register, Vol. III, p. 17.

25. Ibid.

been urged into profanity by the biting sarcasm of a younger man. The court ultimately adopted the resolution that "... if Mister Holmes did not quit worrying Mister Jones and making him curse and swear so, he should be sent to jail." ^{26.}

The number of justices in each court varied considerably. It is probable that the first commission had only four members. ^{27.} By 1661 the average number of justices had increased to such a degree that the dignity of the position was lessened. At the same time there was an increasing amount of disorder and contempt. ^{28.} As a consequence, a law was passed which reduced the number of justices in each county to eight, each of whom in a designated succession should exercise the sheriffalty. The first part of the law was never rigidly enforced, and there were often as many as fifteen justices in a single county. ^{29.} A law of 1710 provided that there be eight or more justices, although the number generally did not exceed eight. ^{30.}

It was also provided that four justices had to be "of the quorum." At least one of them had to be present with a minimum of three other justices for the holding of a court. ^{31.} The courts were poorly attended by the magistrates throughout the colonial period. The hardships involved in the transportation of those days may be legitimately accepted as a partial excuse. But the situation nevertheless caused a great deal of inconvenience to the

25. Ibid.

26. Ibid.

27. McMillen, The County Courts of Colonial Virginia, p. 4.

28. Ingle, Local Institutions of Virginia, p. 89.

29. Ibid.

30. McMillen, The County Courts of Colonial Virginia, p. 5.

31. Ibid.

litigants who made a long journey to court, only to find that no quorum was present. An attempt was made to remedy the situation by placing fines on the justices who were absent without an excuse. This regulation was never very well enforced, however, since the fines were imposed and collected by the courts themselves.³².

The original name of "monthly court" seems to indicate that the first courts met at least once a month. In 1642, the number of meetings was limited to six per year.³³ The justices, however, could call as many special meetings as they desired, and whenever a justice issued a warrant for the arrest of a criminal, he instructed the sheriff to call such a meeting. A special court was also called on occasion at the plea of a particular individual, such as a merchant or ship captain.³⁴ The custom of meeting monthly was revived before long, and there is evidence to show that the average number of meetings throughout the colonial period was eleven or twelve per year.³⁵.

The early County Court had both civil and criminal jurisdiction. In addition, the justices were required to take separate oaths as judges in chancery.³⁶ Orphan's courts were held at least once a year for the purpose of inquiring into estates and binding out propertyless orphans. It became the duty of the County Court to see that orphans were kindly treated and properly educated.³⁷.

32. Chitwood, "Justice in Colonial Virginia," p. 78.

33. McMillen, The County Courts in Colonial Virginia, p. 7.

34. Ibid.

35. Ibid., p. 8.

36. Chitwood, "Justice in Colonial Virginia," p. 80.

37. Ibid.

The first monthly courts were limited to cases involving property valued at not more than one hundred pounds of tobacco, but before the close of the ^{seven}~~eight~~teenth century practically all restrictions were removed. All civil cases save those of less than twenty shillings were now to be decided in the County Courts. The jurisdiction was steadily broadened at the top and narrowed at the bottom. As early as 1643, it had been provided that individual magistrates might handle suits for debts of less than twenty shillings, and might also dictate the punishment of a litigant.³⁸

It is significant to note that servants with complaints always had easy access to the protection of the court.³⁹

A statute of 1676, gave any two justices of the quorum the power to sign probates of wills and letters of administration.⁴⁰

The justices of each County Court made up a Court of Oyer and Terminer for the trial of slaves charged with felony.⁴¹ During the last century of the colonial period, justices could also try slaves charged with capital crimes.⁴²

For a very short time the County Court was given extensive jurisdiction over all important criminal cases: But the Assembly soon came to realize that not only were the justices less experienced, but the juries were less informed and less competent than those of England. An act of 1655 ordered that any offenses involving life or member be referred to the Quarter Court.⁴³ In later years it was ar-

³⁸. Ibid., pp. 80-81.

³⁹. Ibid., p. 82.

⁴⁰. Ibid.,

⁴¹. W. R. Staples, An Address before the Virginia Bar Association. Virginia State Bar Association Report for 1894, p. 144.

⁴². Chitwood, "Justice in Colonial Virginia," p. 83.

⁴³. Ibid., p. 82.

ranged so that any person charged with a criminal offense might be brought before the County Court which acted as a "Court of Examination." The court could either discharge the defendant or indict him if the offense was below the level of a felony. If the offense was a felony, the defendant was held for trial in the Circuit Superior Court.^{44.}

The duty of bringing about public accusation for the violation of a moral code fell upon the shoulders of the churchwardens, but they seem to have shirked the distasteful task.^{45.} Beginning in 1645, the job of principal public accuser was taken over by the grand jury. A law of 1658 provided that a grand jury be empaneled in every court. The system proved so inefficient that the law was repealed in the following year. It was renewed in 1662 and was again unsuccessful, until, in 1677, heavy fines were imposed on courts that failed to swear in juries, and also on absentee jurors. The grand jury then became a permanent feature of the colonial court system.^{46.}

The practice of calling on petit juries was introduced in 1642, the usual method being to select twelve men from among the bystanders every day that court was in session. A member was required to be a property owner to the extent of £50 sterling.^{47.} The decision as to what cases should be submitted to a jury rested largely with the justices, although it is probably that anyone wanting a jury trial could have obtained it without much difficulty. It was

^{44.} Staples, Address before Virginia Bar Association, p. 144.

^{45.} Chitwood, "Justice in Colonial Virginia," p. 83.

^{46.} Ibid., pp. 84-85.

^{47.} Ibid., p. 86.

generally assumed that the expense of a jury trial would be borne by the person who requested it.⁴⁸ During the earlier years, at least, trial by justices proved considerably more satisfactory.⁴⁹ A popular remedy for inefficiency and procrastination on the part of a jury was to keep the jurors from food until after a verdict was rendered.⁵⁰

Another fundamental fixture of the County Court system was the ubiquitous clerk. This official was ordinarily superior in training to the justices themselves.⁵¹ He was the custodian of all county records relating to deeds, wills, contracts, marriages, births, and the annual tax levy. All actions and subpoenas were entered with him. He was secretary to the justices, and he drew up legal papers for individuals. He received fees fixed by an act of the Assembly, and his office was probably the most highly remunerative in the county.⁵²

The only officer whose position might have been equally lucrative was the sheriff. Chosen by the governor from among the justices, his job was highly prized during the early years. But sheriffs were paid off in tobacco, and during the latter part of the eighteenth century, when tobacco prices dropped sharply, there was the ludicrous spectacle of the Assembly being forced to place fines on those magistrates who refused to serve as sheriff.⁵³

48. McMillen, The County Courts of Colonial Virginia, pp. 15-16.

49. Ibid.

50. Chitwood, "Justice in Colonial Virginia," p. 86.

51. McMillen, The County Courts of Colonial Virginia, p. 20.

52. Ibid., pp. 20-21.

53. Ibid., pp. 22-23.

Before looking into the matter of how justice was rendered in the early County Courts, it might be wise to mention some of the numerous other duties which fell to the justices. As has already been mentioned, the judicial features of the court were supplemented by a great many other functions which were legislative and administrative in character. A court was called before each meeting of the Assembly to receive proof of the debts owed by the colony to citizens of a county. A copy of the approved list of claims was then turned over to the burgesses.⁵⁴

Perhaps the most important legislative function of the County Court was the preparation of the tax list, and the laying and collecting of the county levy. The justices divided the counties into precincts, and appointed commissioners to receive the list in each precinct. These lists were turned over to the clerk of the County Court, who compiled a complete list for the justices. The list was used not only in laying the county tax, but was turned over to the Assembly to be used in preparing the public levy.⁵⁵

The court also handled the payment of expenses for representatives in the Assembly.⁵⁶ At the same time, it supervised the election of the burgesses. In the earliest days, the justices had actually selected the burgesses, with the sheriff simply going around and getting the consent of those freemen who were qualified to vote. Later, when each County Court had acquired a specific meeting place, the

54. Ibid., p. 8.

55. Ibid., pp. 24-32.

56. Ibid., p. 32.

sheriff would publicly announce the election day, and people would come to the county seat to vote.^{57.}

The County Court appointed a surveyor whose duty it was to record the county survey in a book set aside for that purpose. Two additional persons were generally appointed to examine the surveyor's books.^{58.}

The justices were entrusted with the payment of bounties for the killing of wild animals.^{59.} They appointed officers to inspect the pork and beef packed for sale within the county, and they nominated inspectors for tobacco that was stored in public warehouses.^{60.} The County Court also appointed and licensed ferry keepers, and fined those who operated inefficiently or without a license.^{61.} It licensed those who wished to keep ordinances or tippling houses. It restricted the number of such houses, established a schedule of rates, and fined those who overcharged or did not live up to specifications.^{62.}

For a number of years, the County Courts had the power to appoint the vestries of the parishes. After about 1640, the vestries became self-perpetuating, but a close link with the courts remained. The vestries were required to provide the courts with complete records, and were also expected to cooperate in matters of poor relief. The strongest tie between a County Court and the parish vestries, however, was the fact that most justices were themselves vestrymen.^{63.}

57. Ibid., pp. 32-33.

58. Ibid., p. 33.

59. Ibid., p. 35.

60. Ibid.

61. Ibid.

62. Ibid., p. 37.

63. Ibid., p. 39.

The courts were required by an act of Assembly to see that roads and bridges were built and kept in repair.⁶⁴

Finally, the County Court served as the administrative arm of the central government. It was an intermediate agency in receiving applications for land grants; and it had the interesting function of getting public subscriptions when the government was in need of financial assistance.⁶⁵ During part of the seventeenth century, the County Court had the power to assist in making the county by-laws, but it was deprived of this power by 1691.⁶⁶

The early courts usually met in a conveniently located tavern or at the home of one of the justices; each court, before adjournment, would agree as to the next place of meeting. But the firm establishment of the County Court in the lives of the people, coupled with the rapid growth of county records, soon rendered such a system impracticable, and many complaints about the inconvenience were voiced.⁶⁷ The Assembly, in 1696, required that the Court of York County be held every month at Yorktown. A courthouse was built there, and regular places of meeting were soon established in most other counties. When a county was unusually large, or was divided by a wide stream, it was sometimes the custom to build two courthouses.⁶⁸

The social and educational value of the early County Court can scarcely be over-emphasized. Court day very

64. Ibid., p. 41.

65. Ibid., p. 43.

66. Chitwood, "Justice in Colonial Virginia," p. 92.

67. McMillen, The County Courts of Colonial Virginia, p. 9.

68. Ibid.

soon became the day to which the whole community looked forward with a good deal of anticipation. It was the one excuse which gave the people an opportunity to assemble, not only for the settlement of legal disputes, but for the discussion of politics, economic problems, current events, and their neighbors. In the absence of modern facilities for transportation and the transmission of intelligence, the County Court was a veritable fountain of information.

"Court day was a holiday for all the country side- especially in the fall and spring. From all directions came in the people on horseback, in wagons, and afoot. On the court-house green assembled in indiscriminate confusion people of all classes - the hunter from the backwoods, the owner of a few acres, the grand proprietor, and the grinning heedless negro. Old debts were settled and new ones made; there were auctions, transfers of property, and if election times were near, stump speaking. Virginia had no town meeting as New England, but had its familiar court day. ^{69.}

How was justice administered by the County Court of colonial Virginia? We have already seen to what extent the justices insisted upon absolute dignity and propriety. The justices were not always well trained, but they were the wealthiest and best educated men in the county, and they took their job seriously.^{70.} The majority of them practiced common sense rather than strict law. They did not worry about legal precedent, but invented ingenious penalties to fit particular offenses. As might be suspected, this led to a great variety of punishments.^{71.}

^{69.} Ingle, "Local Institutions of Virginia," p. 90.

^{70.} McMillen, The County Courts of Colonial Virginia, p. 12.

^{71.} Chitwood, "Justice in Colonial Virginia," p. 88.

Penalties were seldom harsh, although, in extreme cases, offenders were known to receive as many as a hundred lashes on the bare back.^{72.}

Physical punishment was rare, however, since the justices frequently made an effort to appeal to the self-esteem of offenders. Slanderers, for example, were required to ask the pardon of the injured parties in church, and sometimes were made to sit in stocks throughout the long Sunday service. Those who had committed fornication or adultery were forced to make a public confession in church before the whole congregation.^{73.}

The practically minded justices were also known to follow the dictates of expediency on numerous occasions.

"Indeed, from the penalties that they attached to certain offenses, one would think that the judges inclined to the belief that the wickedness of man should be harnessed and made to do service in the cause of righteousness." ^{74.}

Thus it was that one offender was required to paint the church, while another was compelled to build a ferry boat. There are several cases on record in which a wrong-doer was instructed to build a pair of stocks, and then was made to dedicate them by becoming their initial occupant.^{75.} Laws passed late in the eighteenth century still provided for the use of ducking stools, stocks, and pillories.^{76.}

In summary, it must be said that the records reveal no evidence of any great abuses in the County Court system

72. Ibid.

73. Ibid., p. 89.

74. Ibid., p. 90.

75. Ibid.

76. Ibid., p. 91.

of Colonial Virginia. Justice, on the whole, seems to have been administered competently and entirely to the satisfaction of the community. There were certain theoretical defects which might have hindered good government in the counties to a slight extent; but these defects appear to have been potential rather than actual. One which might be mentioned was the fact that the people had no voice in the selection of the justices.⁷⁷ Consequently public opinion was not as effective as it might have been in restraining possible unfair decisions. A second criticism, which later proved to be somewhat more valid, was that the custom of self-perpetuation was making it easy for a few families to gain control and hold a monopoly over county government.⁷⁸

Nevertheless, the advantages of the court at that time far outweighed the defects. It has already been shown that the County Court was an invaluable element in the social life of the people. It provided the scattered and isolated rural population with much needed contacts that it otherwise would have not obtained.⁷⁹ Another important contribution of the court lay in the fact that it afforded the necessary experience in judicial and administrative duties to those who were responsible for setting up a state government after the Revolution. The County Court of Virginia had much to do with the absence of radicalism in the constitutional changes of 1776.⁸⁰

⁷⁷. Ibid., p. 94.

⁷⁸. Ibid.

⁷⁹. Ibid., p. 95.

⁸⁰. Ibid., p. 94.

So it was that very early in its history the County Court became a training ground for eminent lawyers and statesmen. During most of the seventeenth century it had been generally felt that lawyers were little more than untrained nuisances, and that they did nothing but stir up trouble.⁸¹ Conditions were so bad that the pleading of cases by attorneys was discouraged and all but prohibited. By the end of the century, however, the Assembly had imposed a number of restrictions on the practice of law, and the legal profession acquired new and sadly needed dignity.⁸² From that time forward the itinerant country lawyers became another of the colorful features of the County Court. In later years, especially, the lawyers "rode the circuit" from one court to another in search of trade.⁸³ They were often called upon to take cases without any further preparation than a few moments consultation with their client. But a wide general knowledge of law and a keen understanding of human nature stood them in good stead.⁸⁴ It was these same young lawyers who often developed into the great judges, orators, and statesmen of the Commonwealth. The most prominent lawyers of the state always welcomed an opportunity to attend the County Court; they thoroughly enjoyed participating in the lively debates.⁸⁵ Apparently much of the world's great oratory was lost upon the ears of imper-

81. McMillen, "The County Courts of Colonial Virginia," p. 19.

82. Ibid.

83. J. J. McDonald, Life in Old Virginia, p. 197.

84. Ibid.

85. Staples, Address before Virginia Bar Association, pp. 150-52.

turbable county juries.

So much for the County Court of colonial Virginia. If I have seemingly lingered too long on details so easily ascertainable from secondary sources, it is only because the colonial court was, in its essential character, the same court that was to exist for nearly a century as a State institution.

II. The County Court as a State Institution.

One writer, describing the County Court in glowing terms, has said, in part:

"It will be seen that they were as remarkable for the long period during which they existed, the few and unimportant changes made in their organization and jurisdiction, as they were for the character of the men who composed them, and the marked influences they exerted both directly and indirectly upon the habits, conduct, and opinions of the Virginia people." ¹.

Thus the Constitution of 1776, while it made no specific reference to the County Courts, preserved the system in its entirety. The Constitution provided that legislative and judicial powers should be forever separate and distinct, but made an exception in the case of the County Court; the justices of that court were to be eligible for membership in either house of the Assembly.² The County Courts were given authority to recommend candidates for vacant militia offices. The appointment of new justices was also to be made upon the recommendation of the courts. The County Courts were to themselves fill the vacancy in the event that a new Clerk of the Court was needed. In addition, they were to appoint constables, and were to nominate sheriffs and coroners to be commissioned by the governor.³

The jurisdiction of the County Court was first defi-

1. Ibid., p. 145.

2. F. N. Thorpe, ed., The Federal and State Constitutions, Colonial Charters...of the U. S. A., Vol. VII, pp. 3812-19.

3. Ibid.

nately outlined by act of March 2, 1819, which read, in part, as follows:

"The justices of every such court, or any four of them, as aforesaid, shall and may take cognizance of, and are hereby declared to have power, authority, and jurisdiction to hear and determine all causes whatsoever now pending, or which shall hereafter be brought, in any of the said courts, at the common law or in chancery, within their respective counties and corporations, and all such other matters as, by any particular statute, is or shall be made cognizable therein, except such criminal causes, where the judgment, upon conviction, shall be for the loss of life or member, or imprisonment in the public jail and penitentiary house, as shall not be expressly declared cognizable in the said courts by act of assembly; and except the prosecution of causes to outlawry against any person or persons; and except all causes whose value does not exceed twenty dollars or four hundred pounds of tobacco, other than prosecutions on any penal law of this Commonwealth; and also, except such cases as are by law exclusively vested in any other tribunal." 4.

When the code of 1819 was drawn up, its illustrious compiler, Benjamin Watkins Leigh, said: "The institution of the County Court originated as early as 1623, and as it is the most ancient, so it has ever been one of the most important of our institutions, not in respect to the administration of justice, only, but for police and economy." 5.

In 1829, there gathered in Richmond one of the greatest state conventions in American history. Virginia has never again seen so impressive a gathering of eminent statesmen. Among those present were two elderly and venerable ex-presidents, James Madison and James Monroe. There was a future president, John Tyler. There was John Marshall, who, still at the height of his power as Chief

4. The Revised Code of the Law of Virginia, 1819, p. 246.

5. Holmes Conrad, "The Old County Court System of Virginia: Its Place in History." Virginia State Bar Association Report for 1908, p. 333.

Justice, presented so awe-inspiring a figure, that the lesser dignitaries were hesitant about disputing his opinions.⁶ There was John Randolph, who also had attained national prominence; and a large number of other very capable statesmen, who attracted so little attention only because of the high standards of comparison. It was this group that was to vote overwhelmingly in favor of giving constitutional status to the County Court.⁷

On October 20, 1829, Chief Justice Marshall, who was a member of the Committee on the Judiciary Department of Government, brought in a report recommending that judicial power be vested in a Court of Appeals, in such Inferior Courts as the legislature might establish, and in the country courts. The report also repeated the self-perpetuating principle; namely that justices should be appointed by the governor, with the advice and consent of the Senate; but upon the recommendation of the respective County Courts.⁸

Several days later, Mr. Alexander Campbell of Brooke, who had been a minority member of the committee, was given permission to go through the formality of submitting a plan of his own, although he undoubtedly realized that it would not receive serious consideration. He proposed that all counties be divided into wards for the apportionment of justices of the peace among the people, and that

6. Proceedings and Debates of the Virginia Convention of 1829-30, p. 507 et seq.

7. Ibid., 530.

8. Ibid., p. 33.

the persons authorized to vote for members of the General Assembly in each ward should elect their respective justices for a specified term of years.⁹

Such attack as there was upon the County Courts was led by Mr. Bayly of Accomac. His argument centered about the fact that he was opposed to granting constitutional independence to that court.¹⁰ Consequently, when the Committee of the Whole took up a discussion of the report of the judiciary committee, Mr. Bayly moved to strike out the phrase "and in the County Courts" from the committee recommendation. He argued that this would not destroy the County Court system, but would simply place those courts, along with other inferior courts, subject to the control of the General Assembly. It was his desire to leave the Court of Appeals as the only supreme and constitutional court, with all others subject to legislation. He said: "I do not understand why courts of higher grade, and the Judges of these courts, which it is the wish of gentlemen should be so perfectly independent, should be put in the power of the General Assembly to abolish or reform, and the County Courts, so inferior in every requisite qualification to exalt a tribunal of justice, shall be held too sacred ever to be changed."¹¹

Mr. Bayly went on to point out that however unfit to discharge his duties a justice might be, he was still

9. Ibid., p. 42

10. Ibid., p. 502 et passim.

11. Ibid., p. 502.

able to know that his position was perfectly secure. Such a man was, at one and the same time, a justice of the peace, a justice of the County Court, a commissioner of revenue (appointed by the same County Court), and the possessor of various other ministerial and executive functions. Yet the people were to have no voice at all in the appointment of this powerful official.^{12.} It was said further that while the County Court was commonly looked upon as an economical means of justice, in reality suitors were sometimes put off for weeks and even years, at an expense that turned out to be greater than the value of the case.^{13.}

The gentlemen from Accomac, in an endeavor to prove his point, had, perhaps unintentionally, involved himself in an enumeration of defects in the County Court system. Judging from the vast amount of respect which the Convention in general held for the County Court, it becomes immediately evident that Mr. Bayly had placed himself out on the end of a long limb. Governor Giles, in his address to the Convention, had already expressed the belief that the organization of the County Courts was marked with peculiar wisdom.^{14.} He indicated that the great amount of power vested in the justices had not been abused; rather, the magistrates had exerted an immeasurable moral influence, and had made the people of Virginia famous for their obedience to law. "Hence, it has been so frequently and emphatically said, that law is the only despot here." ^{15.}

^{12.} Ibid., p. 503.

^{13.} Ibid., p. 504.

^{14.} Ibid., p. 241.

^{15.} Ibid.

Mr. Marshall was the first to rise in opposition to the statements made by Mr. Bayly. He pointed out that the discussion had now resolved itself into the question of whether or not the County Court should continue to exist.¹⁶ The Chief Justice suggested that no amendment of the type offered by Mr. Bayly should be considered, unless it was desired to remove the County Court from the legal system of Virginia. In his opinion, it was absolutely necessary to have a County Court of some kind; otherwise, the entire system of internal police would be adversely affected. No state in the Union had been characterized by less disquiet or less ill-feeling than had Virginia; and this state of things was, in large measure, due to the effective operation of the County Courts, and to the high character of the magistrates who composed those courts.¹⁷

Mr. Philip P. Barbour, supplementing Chief Justice Marshall's defense of the County Court, said that there had never been a tribunal where more practical and substantial justice was administered. He was heartily in favor of giving the court a constitutional foothold where the legislature could not meddle with it. Not only was the County Court an admirable court of justice, but it gave an opportunity for the discussion of public affairs; it increased the popular interest in, and knowledge of, political problems.¹⁸

16. Ibid., p. 505.

17. Ibid.

18. Ibid., p. 507.

Mr. Bayly confessed that he was far too mediocre an individual to present a competent argument in reply to two such learned and highly esteemed gentlemen. But he desired to quote the opinion of a man who was equally as great as either of those worthy personages.^{19.}

So it was that Mr. Bayly of Accomac was among the first to indulge in what has since become something of a popular pastime; namely the practice of quoting Thomas Jefferson in a political debate.

The quotation is taken from one of Jefferson's voluminous letters.^{20.} I take the liberty of repeating a fairly large portion of it, since it concisely sums up most of the arguments which could be effectively used against the County Court systems. It reads as follows:

The justices of the Inferior Courts are self-chosen, are for life, and perpetuate their own body in succession forever, so that a faction once possessing themselves of the bench of a county, can never be broken up, but hold their county in chains, forever indissoluble. Yet these justices are the real Executive as well as Judiciary, in all our minor and most ordinary concerns. They tax us at will; fill the office of sheriff, the most important of all the Executive officers of the county; name nearly all our military leaders, which leaders, once named, are removable but by themselves. The juries, our judges of all fact, and of law when they choose it, are not selected by the people, nor amenable to them. They are chosen by an officer named by the court and Executive. Chosen, did I say? Picked up by the sheriff from the loungings of the court yard, after every thing respectable has retired from it."^{21.}

And so the argument continued, one group saying that

19. Ibid.

20. Dated July 12, 1816. It is significant to note that Jefferson himself was, for a time, a justice of the peace.

21. Debates, 1829-30, p. 508.

it had no intention of destroying the court, but merely wished to place it under legislative restraint; the other group holding that to remove the court from the Constitution would most certainly destroy it. Mr. Jefferson was accused of being too much of a theorist, and it was said of Mr. Bayly that, "He will not destroy the courts; but he will leave them almost to the winds, and will himself give them a pretty good breeze to begin with." 22.

John Randolph, who cordially hated Jefferson and everything Jeffersonian, took the opportunity to air his own views. The only point on which Jefferson's theorizing might be considered as authoritative, he said, was in the construction of a certain type of mould board plow. Jefferson had invented such a plow, and had proved by mathematics and geometry that it presented less resistance.²³ Randolph went on to say that he had never met a newcomer to Virginia who was not struck with admiration at the County Court system. The system, he believed, was a happy medium between the instability of popular elections, and the corruption and oppression of executive patronage.²⁴

Mr. Benjamin Watkins Leigh and Mr. Chapman Johnson also spoke in behalf of the court. The former praised the manner in which the court handled its manifold duties, not only in common law and equity, but as a court of pro-

22. Ibid., p. 509.

23. Staples, Address before Virginia Bar Association, p. 140.

24. Conrad, "The Old County Court System of Virginia," p. 336.

bate and as an Orphan's Court.²⁵ The latter confessed that in his younger days he had had some misgivings about the County Court, but he had since come to realize that it possessed many hidden benefits which did not immediately meet the eye. He praised the court as a place where the poor and humble could receive justice on the same plane as the rich, and where the rights and obligations of citizenship were taught to all members of society.²⁶

Those who sided with Mr. Campbell and Mr. Bayly were neither so eminent nor so numerous, but they waged an eloquent battle in behalf of what was destined from the first to be a losing cause. Mr. Henderson of Londonn, for instance, said that he had practiced before the County Courts for a number of years, and that he could not speak very highly of them. The justices, he maintained, were usually worthy men, but they were not well acquainted with the law, and on the whole, were poorly equipped to discharge their duties.²⁷ Continuing his argument at a later period, Mr. Henderson suggested that the County Courts required so little knowledge of law that "...they tend to make the lawyers ignorant and to impart that ignorance to the benches of the Superior Courts." ²⁸.

The debate went on for some time, but it was apparent from the first that the County Court was still at the height of its power. A vote was finally taken on December 1, 1829,

25. Ibid.

26. Debates, 1829-30, p. 512.

27. Ibid., p. 513

28. Ibid., p. 522.

and the clause "and in the County Courts" was retained as a constitutional provision; only twenty-two of the ninety-odd delegates voted in favor of the proposal to strike out the clause.^{29.}

Mr. Campbell now called the attention of the delegates to the fact that the first clause of the committee report read as follows: "Resolved, That the Judicial power shall be vested in a Court of Appeals, in such Inferior Courts as the Legislature shall from time to time ordain and establish, and in ^{30.} the County Courts."^{31.} In consequence of an alleged suggestion from John Marshall, he moved that the word "the" be removed from the phrase, "in the County Courts." His argument was that if the word were retained, the legislature might feel itself withheld from any alteration of the court.^{32.} The majority of the Convention believed the omission of the word could do no harm and the motion was carried.^{33.}

On the following day, however, it was decided to vote again on the issue. Mr. Johnson argued that striking out the word "... went to destroy the indication they had given as to the tribunal they intended to erect."^{34.} In other words, it had to be made clear that they were specifically referring to the County Courts of Virginia which were in existence at that time. Another vote was taken, and the word "the" was reinserted.^{35.}

29. Ibid., p. 530.

30. Italics inserted.

31. Debates, 1829-30, p. 530.

32. Ibid.

33. Ibid., p. 531. The vote was close, there being 48 ayes and 42 noes.

34. Ibid., p. 537.

35. Ibid. 44 ayes, 50 noes.

So it was that the County Court was, for the first time, given full constitutional status. When the amended Constitution appeared on January 14, 1830, Article V contained specific provisions relating to the County Court.³⁶ In addition to granting constitutional authority to the court, its right to recommend new justices to the governor was again recognized.³⁷ The Constitution also provided that the County Courts retain the right to appoint clerks and constables, and to nominate sheriffs and coroners.³⁸

Just what the nature of public opinion toward the County Court was during the next two decades I have been unable to ascertain with any degree of accuracy. A brief glance at the amended Constitution which was adopted by the Constitutional Convention of 1850-51, however, reveals that radical changes were made in the whole system of county organization.³⁹ A measure of evidence as to the changing attitude toward the County Court may be obtained through an examination of the Proceedings of that Convention.⁴⁰

The discussion of County Courts began at the Convention when Mr. Scott of Richmond brought in the report of the Committee on County Courts, County Organization, and County Police.⁴¹ The report provided for County Courts to be composed of justices of the peace elected by the

36. Thorpe, Constitutions and Charters, Vol VII, pp. 3819-29.

37. Section 7.

38. Section 8.

39. Thorpe, Constitutions and Charters, Vol. VII, pp. 3829-52.

40. Unfortunately, the only available copy of the Proceedings is incomplete. The Convention adjourned on August 1, 1851, and the Proceedings go only to June 24. In addition, other pages are missing at frequent intervals. The Proceedings consist of newspaper supplements; pages not consecutive.

41. Proceedings of the Constitutional Convention of 1850-51, Feb. 8, 1851.

qualified voters under a township system. A presiding justice was to be chosen by the justices themselves; he, with not less than two, nor more than four associates was to constitute the court. There were to be twelve terms during each year, in only two of which appeals from the judgments of justices, or other civil controversies might be heard. The presiding justice and his associates were to receive a per diem compensation while sitting as a County Court or as a Board of Police. Finally, the individual justices were to be allowed to hear matters of civil controversy where the demand did not exceed thirty dollars.⁴²

There was quite a bit of controversy from the start, although most of it involved substitute plans which varied chiefly in matters of detail. One delegate, for example, submitted a plan for a chief justice and two associates, any two of whom might constitute a court. They were to be judges of both fact and law, and were to have the power to remove county officers by a two-thirds vote.⁴³ Another plan provided that justices, although elected from townships, should have jurisdiction over the entire county. The County Court was to meet only twice a year for the trial of appeals and civil causes in law and equity; special sessions for criminal matters might be provided for by law.⁴⁴

These proposals were comparatively mild, but Mr. Willey of Monongalia arose and announced that his constituency

42. Ibid.

43. Ibid.

44. Ibid.

demanding not only a reform of the existing system, but a complete annihilation of it.⁴⁵ He desired to present a substitute plan which had been prepared by Mr. Van Winkle and himself. Under this plan, the Assembly was to prescribe the extent of the separate jurisdiction of justices, and could authorize two or more to hold special courts for examination or trial. But no justice, under any circumstances, was to be a member of any court having a general civil jurisdiction. The County Court was to be abolished. A "court of probate" was to be organized under an elected judge. The justices of each county were to make up a board of police to administer all internal affairs not of a judicial character.⁴⁶

It was not until late in the spring, however, that Mr. Willey was able to give a detailed account of his objections to the existing County Court system.⁴⁷ The first criticism was that the courts were self-perpetuating and self-controlling. It is evident that this problem was solved by all the plans suggested. The second objection was that the County Courts were absolutely incompetent as judicial tribunals. Men selected from various pursuits of life, who had never had legal training, could not make capable justices, no matter how honest and intelligent they might be. Mr. Willey seriously doubted that the committee would be able to find four or five good

45. Ibid.

46. Ibid. The last proposal corresponded very closely to one embodied in the original committee report.

47. Ibid., June 5, 1851.

judges in every county. A third objection was that there was a lack of fixed responsibility for the administration of justice in the County Courts as they then existed; the office of justice was merely a sideline to those who made up the court. In the fourth place, it was held that the County Courts were not impartial or free from prejudice. A fifth objections was that the courts no longer possessed sufficient dignity to hold the confidence and respect of the people; the public was no longer impressed with the majesty of the law.⁴⁸.

But it was Mr. Willey's next criticism that is far and away the most interesting. We have no way of verifying his statements, but they undoubtedly contain a considerable element of truth. If they do not, the gentlemen from Monongalia must certainly be credited with an astounding capacity for prophecy; his opinions, though apparently shared by very few of his contemporaries, were identical with a number of the criticisms which were to bring about the abolition of the County Court a half-century later. Mr. Willey declared the County Courts to be a "prolific source of the pettyfoggers and pettyfogging." He said, in part:

"But it is said that these county courts have not any such demoralizing influences on the people, and that they are, in fact, one of the best educational institutions in the land; that they bring the people together once a month; that the people thus interchange views upon

48. Ibid.

various subjects, get acquainted and acquire friendly feeling toward each other. There might have been some propriety in ascribing such advantages as these to the county courts before the days of the railroads, steamboats, newspapers, and the various modern appliances and facilities for obtaining information [This in 1851!]. But allow me to say that my experience teaches me that these courts result in very different consequences now. There are more punch and port wine and old 'Monongahela' - as we say west of the Alleghanies - discussed on such occasions, than literature and politics, and there are more assaults and batteries perpetrated sometimes, than there are new friendships formed or old ones strengthened at these courts. They have a demoralizing influence on the community rather than an educational bearing; ~~disturb~~^{upset} the industrial pursuits of the people, and often promoting discord in their social relations.^{50.}

In conclusion, Mr. Willey cited the fact that the committee report offered no means of enforcing promptness on the part of the justices; he maintained that there was often a good deal of expensive delay in getting enough justices together for the holding of a court. He pointed out also that the inefficiency of the County Courts had forced the legislature to grant virtually concurrent jurisdiction to the Circuit Courts. The latter could then assume all the civil authority of the former without any extension of its jurisdiction.^{51.}

Mr. Scott immediately arose in defense of what he termed those "ancient, time-honored, and invaluable courts."^{52.} He pointed out that, through two and a quarter centuries of political, economic, and social progress, the County Courts had been clung to as institutions worthy of the confidence and respect of all the people. He called attention to the fact that the County Courts had possessed no constitutional

49. Ibid.

50. Ibid.

51. Ibid.

52. Ibid.

status during the long period from 1776 to 1830; at any time during those years the General Assembly could have stricken down the County Courts or set up others in their place. Yet no man in the history of Virginia had ever attempted by a motion in either house of the legislature to remove their civil and criminal jurisdiction from those courts.⁵³.

Mr. Scott went on in detailed praise of the County Courts system, stressing the number of illustrious men who had graduated from the County Court practice. He agreed that justices should be elected, and that their appointive power should be reduced, but he derided Mr. Willey for referring to men who were, on the whole, wise, prudent, and discreet, as being ignoramuses. He said further that the destruction of the County Court would necessarily result in the virtual repeal of two-thirds of the Virginia code of laws.⁵⁴.

Mr. Hunter of Jefferson, in attempting to reconcile the two groups, brought out a point which was, for the most part, indisputably true, and which goes a long way toward clarifying the reasons for opinions that were so seemingly contradictory. The essential fact to be considered was that Mr. Scott of Richmond, and Mr. Willey, who came from northwest Virginia, were really talking about two different County Courts. It was an accepted truth that the system operated better in the east than

53. Ibid.

54. Ibid.

in the west. A great many of the people in the east, especially in the lowland districts, were gentlemen of the leisure class. The younger men of the group were often wealthy, and almost always well-educated. They studied law, retired to their estates, and made excellent material for the office of the justice of the peace. The men of the west were undeniably men of honor and integrity, but they were frankly a laboring people. They had less leisure, less opportunity to obtain an education, and less interest in the mild entertainment of conducting a court. They could never afford to perform such duties without remuneration.⁵⁵

Mr. Van Winkle then spoke briefly in support of Mr. Willey, suggesting that perhaps the difference between the eastern and western courts was not so great as had been indicated. He said:

"I have not yet heard it upon this floor, but it may not be improper for me to say, that it became my duty to listen to some discussions of this subject elsewhere, and while gentlemen from the east, with a tenderness that does them great credit, would not at first venture to urge a single complaint against their justices of the peace, yet as we progressed in the argument and began to get into each others confidence, it did leak out now and then, that eastern justices were not quite so immaculate as we had been led to suppose; that in one county they interfered too much in the elections, in another county they had sought to override the people, and in another county they attempted to do something else, and so it went on, until I began to think that they were not much better than our own."⁵⁶

Here, unfortunately, the Proceedings came to an abrupt halt. It seems that the time was not yet ripe for such

55. Ibid.

56. Ibid.

proposals as those of Mr. Willey and Mr. Van Winkle. A close examination of the Constitution of 1851, however, reveals changes that unquestionably were steps in the decline of the County Court. The provisions relating to that court, and to county organization in general, are so radically different from those in the previous Constitution, that it seems advisable to quote them in their entirety. They are as follows:

"There shall be in each county of the commonwealth a County Court which shall be held monthly by not less than three nor more than five justices, except when the law shall require the presence of a greater number.

"The jurisdiction of the said court shall be the same as that of the existing County Courts, except so far as it is modified by the Constitution or may be changed by law.

"Each County shall be laid off into districts, as nearly equal as may be in territory and population. In each district there shall be elected by the voters thereof, four Justices of the Peace, who shall be commissioned by the Governor, reside in their respective districts, and hold their offices for the term of four years. The Justices so elected shall choose one of their own body, who shall be the presiding Justice of the County Court, and whose duty it shall be to attend each term of said court. The other Justices shall be classified by law for the performance of their duties in court.

"The justices shall receive for their services in court a per diem compensation, to be ascertained by law, and paid out of the county treasury; and shall not receive any fee or emolument for other judicial services.

"The power and jurisdiction of the Justices of the Peace within their respective counties shall be prescribed by law.

"The voters of each county shall elect a Clerk of the County Court, a Surveyor, an attorney for the Commonwealth, a Sheriff and so many Commissioners of the revenue as may be prescribed by law... Constables and Overseers of the

of the Poor shall be elected by the voters, as may be prescribed by law."⁵⁷.

Thus while the Constitution made no change in the jurisdiction of the County Courts, it did ~~not~~ seriously alter their appointive powers. But the really significant changes were those which affected the character of the court itself. Two of those changes appear to have been of primary importance. The first was the fact that the justices, along with the clerks of the court and the sheriffs of the counties, were to be elected by popular vote. The second was the fact that justices were not to be paid for the first time. One writer, confessing a sentimental leaning toward the old County Court system, maintained that these modifications dealt a severe blow to the efficiency and dignity of the court.⁵⁸ Without harboring any undue sentiment, however, it is safe to say that his criticism was in large measure legitimate. There is certainly no evidence which indicates that the innovation of paid justices, who were popularly elected, did anything to improve the standards of judicial administration in Virginia. Benjamin Watkins Leigh and John Randolph had both warned the Convention of 1829-30 that the introduction of paid justices would result in the deterioration of the County Court; several years after the Convention of 1851, it became evident that their prediction was coming true.⁵⁹

⁵⁷. Article VI, Sections 25-30.

⁵⁸. Conrad, "The Old County Court System in Virginia," p. 342.

⁵⁹. Staples, Address before the Virginia Bar Association, p.142.

The fundamental problem involved, however, is the question of what brought about the rather sudden change in public opinion in regard to the County Court. It was only a little more than twenty years since the court had been given a rousing vote of confidence at the Convention of 1829-30. Yet practically all the delegates at the Convention of 1850-51 were agreed that justices of the peace should be popularly elected and that they should be paid. The east maintained that it had men of wealthy, leisure class, who were willing to serve as justices without compensation.⁶⁰ The west desired to abolish the County Court altogether.⁶¹ Did the east, then, wish to pay its justices and to elect them by popular vote, simply in order to provide an improved court system in the west? It is exceedingly doubtful. The only solution seems to lie in the opinion voiced by Mr. Van Winkle that the County Courts of the east were not as excellent as the delegates from that section wished to have others believe.⁶² It is altogether possible that the administration of justice in eastern Virginia was not on as lofty a plane as it once had been. It is also easily believed that it was becoming increasingly difficult to find a sufficient number of wealthy, educated country gentlemen who were willing to amuse themselves by being justices of the peace.

60. Proceedings, 1850-51, June 4, 1851.

61. Ibid.

62. Ibid.

So it was that the glory and dignity of the old County Court began to pass slowly away. But, down until reconstruction days, the court continued to be an exceedingly valuable institution.

In bringing this section to a close, we might mention, very briefly, the Constitution of 1861, which was in force in Virginia during the War Between the States.⁶³ This Constitution restored most of the former appointive powers of the County Courts. Clerks and attorneys for the courts were to be appointed by the courts themselves. Sheriffs were to be nominated by the courts and appointed by the governor. Coroners, constables, surveyors, commissioners of the revenue, and overseers of the poor were all to be appointed by their respective County Courts.⁶⁴

⁶³. Journal of the Acts and Proceedings of a General Convention...1861.

⁶⁴. Article VI, Sections 11-17.

III - - - The Passing of the County Court 1867-1902

The old County Court system was continued, after a fashion, during reconstruction days, pending the adoption of a new Constitution. But all justices were appointed by the military officer in charge of the State.¹ Rigorous disfranchisement regulations, however, had completely disqualified most of the capable men in the state, and it was frequently difficult to find intelligent men to fill offices.² The situation is admirably illustrated by a case tried before a justice appointed by General Canby. The details of the case are exceedingly entertaining, but need not be gone into here. Suffice it to say that the trial, held in the justice's two-room log cabin was characterized by incredible ignorance of law, on the part of all parties concerned. The judge, if uneducated, was certainly not lacking in humor. When asked his opinion on a difficult point of law, he grinned and replied: "I don't know much about the book laws. I never went to school but two days in my life. It rained like all scissors both days, and the teacher didn't come nary day of the two, so I quit wastin' time and went to work, and I've been at work ever since." ³.

Such incidents are amusing, it is true, but none the less deplorable. And the brand of justice that was to be supplied in Virginia during the next few years was even

1. McDonald, Life in Old Virginia, p. 183.

2. Ibid.

3. Ibid., p. 184.

worse. In 1867 there gathered in Richmond the Constitutional Convention which was to produce the notorious Underwood Constitution." "Both the records of the convention and the papers of that day, as well as living witnesses, testify that this was the most conglomerate and heterogeneous body of men ever assembled in the history of the world to frame a constitution for the government of a free and enlightened people. Made up of different nationalities and different races, carpet-baggers, adventurers, and negroes, with a hopeless minority of reputable Virginians trying to stem the tide of the majority in their attempts to humiliate and disgrace the fair name of Virginia, the hall of the convention became a bedlam of chaotic confusion, perturbation, and anarchy." 4.

That part of the Debates of the Convention which might be of value in this discussion was never published. The loss, however, is not especially great. The Dispatch, on April 25, 1868, said: "The debates are utterly worthless - They are a fraud; because the jargon of the negroes is rendered into tolerable language and will appear as the declamation of passably well informed orators." 5.

The Constitution, as adopted by the Convention in 1868, and ratified several years later, left nothing of the old County Court, except its name and its characteristic monthly meeting.⁶ It provided for a County Court to be held in every county each month by a judge who was

4. J. N. Brenaman, A History of Virginia Conventions, p. 76.

5. E. G. Swem, " A Bibliography of the Conventions and Constitutions of Virginia...." Virginia State Library Bulletin, Vol. III, No. 4, p. 418.

6. Thorpe, Constitutions and Charters, Vol. VII, pp. 3871-04.

to be learned in the law. Counties containing less than eight thousand inhabitants were to be attached to adjoining counties for the formation of court districts. Judges were to be chosen by the General Assembly, and were to hold office for six years. The jurisdiction of the County Courts was to be the same, except as modified by the Constitution or changed by law.⁷.

The Constitution further provided that the qualified voters were to elect a sheriff, a county clerk, a county treasurer, and commissioners of the revenue. Each county district was also to elect one supervisor, three justices of the peace, one constable, and one overseer of the poor. The supervisors of the districts were to constitute a board of supervisors for the county. It would be their duty to audit accounts, examine the books of the revenue commissioners, regulate and equalize property assessments, fix the county levies, and care for other administrative matters that had once been the function of the County Courts.⁸.

"By the clauses of the constitution disfranchising all ex-officers of both state and local governments, requiring the test oath as a qualification for office, and excluding those thus disfranchised and disqualified from jury service, the destiny of the State was left in the hands of the densely ignorant freedman, who were without experience in government and utterly lacking in the tradition of public morality - a people who, by their very

7. Article VI, Section 13.

8. Article VII.

nature and training were an easy prey to unscrupulous demagogues."⁹.

The Constitution decentralized the state government, and had local officers chosen by popular vote. The forty-three black counties, the most populous in the state, would, as a result, be in the hands of negro office-holders and their carpetbag allies. Officers were to be elected under a township system such as that practiced in thickly populated New England. It was entirely unsuited to sparsely settled Virginia.¹⁰ The Underwood Convention had ignored the historic fact that the entire system of political government in Virginia, rested on the principle of local self-government, and that the old County Court system had been the most distinct expression of that principle.¹¹ The long-established functions of the court were altered, largely for the purpose of creating additional salaried offices.¹² The number of officers in each county increased from about twenty to forty-eight or more, all elected by popular vote.¹³

As a consequence, the primary interest of the people, was turned toward the larger problem of retaining their suffrage. Fortunately, the sympathetic General Schofield, who had been put in charge of the government, was opposed to the disfranchisement clauses; he refused to appropriate money for an election at which the new Constitution might be ratified.¹⁴ For this reason, Virginia remained unreconstructed

9. R. L. Morton, Virginia Since 1861 (History of Virginia, Vol. III), p. 127.

10. Ibid., p. 130.

11. Conrad, "The Old County Court System of Virginia," p. 343

12. Ibid., p. 344.

13. Morton, Virginia Since 1861, p. 131.

14. Ibid., p. 136.

and under military rule until 1870.

President Grant, in a message to Congress of April 7, 1869, advised that an election be held in Virginia for the ratification of the Underwood Constitution. Sections One and Seven, relating to the test oath and disfranchisement, were to be voted on separately. The conservative element had desired to vote separately on the county organizations clause also, but the President had yielded to cabinet members who feared the possible destruction of the new public school system. An election was held, and, although the Constitution was ratified, the people managed to defeat the disfranchisement clauses. The county organization plan remained intact.¹⁵

By an act of March 28, 1875, however, the legislature succeeded in bringing about a reapportionment which broke up the gerrymander of the Constitution. Gradually affairs returned to a more nearly normal state. The Conservative party came into power, and the poll tax was revived.¹⁶

A number of laws were passed which did much to save the jurisdiction of the County Court. A summary of the general laws relating to the court, at the close of the year 1873, is as follows: "The county courts may grant letters of administration, admit wills to probate, appoint guardians, curators, and committees, and shall have jurisdiction to hear and determine all motions and other matters made specially cognizable therein by any statute.

¹⁵. Ibid., p. 144-45.

¹⁶. Ibid., p. 162.

"The county court shall likewise have jurisdiction of all presentments, informations and indictments for misdemeanors.

"The county court shall execute and enforce, by proper process, and in the manner provided by law, every judgment, decree, or order, heretofore entered therein, and shall supervise, correct, and enforce, in like manner, any rule taken, or order, entry, or endorsement made by the clerk of said court."¹⁷.

Another very significant law provided that any judge of a county court, who was also a licensed lawyer, could appear as an attorney in any case not pending in his own court, or which had not been taken from his court, or could not be taken to his court on appeal.¹⁸.

One writer takes a surprisingly liberal view toward the reformation of the County Court by the Underwood Constitution.¹⁹ Like many other Virginians, he has a strong sentimental regard for the old court, but he is convinced that it had served its purpose and was properly done away with. He says: "All will admit it was not adapted to the changed condition of society produced by the war, and it was therefore wisely and properly abolished. It now lives only in the ancient statutes of the State, in sketch books and historical magazines, and in the county records, which have escaped the hands of time and the destructive ravages of Federal soldiers, and in

¹⁷. The Code of Virginia, 1873, p. 1029.

¹⁸. Ibid., p. 1058.

¹⁹. Staples, Address before Virginia Bar Association, p. 147.

the beneficial influence it exerted for so many years upon the habits, tastes and conduct of the people of Virginia." 20.

Taking a long-run point of view, one is inclined to share this attitude. The chief factor which made it desirable to retain the old County Court system in 1870 was a just dread of negro and carpetbag rule. But with a return to the normal political situation, and the rise of a new economic society, the need for the old system of County Courts was greatly diminished. The fact that the new systems developed disastrous and incurable defects was not, as Conrad believed,²¹ sufficient reason for a return to the old one. Simple, common-sense justice and county administration were no longer applicable to increasingly complex legal and economic problems.

The admitted social and recreational functions of the old County Court were fully retained by the new system, although it is logical to believe that these functions declined in importance as a modern, industrial society made rapid strides. In the Tidewater area, however, which had always been the stronghold of the County Court, and which was still rural and agricultural in character, the monthly meeting of the court continued to be a matter of moment for quite a few years after the Civil War. The conveniently located "Court House Bounds" was still the

20. Ibid.

21. "The Old County Court System of Virginia," p. 345.

goal of people from miles around on every court day.²² Just as in colonial days, they came on foot, on horseback, and in all kinds of vehicles, to transact their business, or simply to enjoy a holiday. The Court House Bounds on court day resembled a cavalry camp. The court green swarmed with crowds of people selling land, timber, and animals, settling debts, or just swapping lies. Many of the farmers made wise purchases of horses, cattle or mules, but did not fare so well when they bought ready-made clothing from some wily merchant's bankrupt stock. The older and more thrifty negroes brought oysters and fried chicken, and did a lively business serving the demands of the hungry crowd. Yet, in all this seeming confusion, business was transacted in a quiet orderly manner. Perhaps nowhere else in the country could one view anything comparable to this time-honored monthly meeting.²³

But the County Court was nevertheless doomed to destruction. A number of serious defects had appeared in the court structure, and criticism was beginning to pour in from all sides. The situation was particularly aggravated during the years from 1879 to 1883. At that time, General William Mahone and his "Readjuster" party had come into power as a result of advocating partial repudiation of the state debt.²⁴ That party was faced with the problems of appointing judges in the hundred counties of the state. There were few reputable lawyers in the

22. McDonald, Life in Old Virginia, p. 188.

23. Ibid., pp. 189-192.

24. Morton, Virginia Since 1861, p. 197.

party; many incompetent and unscrupulous men had to be chosen in order to get loyal office-holders. To make way for the new men, about three-fourths of the county and corporation judges were removed. This tampering with the judiciary was the primary factor in bringing about the eventual downfall of Mahone and his followers.²⁵.

But the County Court possessed defects that could not be remedied by a change in political parties. One critic suggested that the General Assembly had made a mockery of the constitutional requirement that a county judge be learned in the law. One could not expect to get a capable judiciary for salaries ranging between \$350 and \$750. Many of the County Courts were intolerable travesties; anything that could be said about waste and inefficiency in a court of justice applied to them.²⁶.

Another writer, several years later, urgently requested a constitutional amendment which would absolutely prohibit any judge of any court from practicing law during his term of office.²⁷. As has already been mentioned, the judges of the County Courts, were permitted to practice law in the Circuit Courts of their own counties, and in most outside courts. The excuse given for the existence of such a situation was that the inadequate salaries compelled the judges to supplement their paltry

²⁵. Ibid.

²⁶. R. G. H. Kean, "Our Judicial System: Some of its History and some of its Defects." Va. State Bar Association Report for 1889, pp. 153-54.

²⁷. J. P. Harrison, "Suggested Changes in Our Judicial System." Virginia State Bar Association Report for 1899, p. 234.

pay with what they could earn elsewhere. The objections to this system are obvious. No judge should be placed in the position of having to hold a court where his client may be a litigant. No client should be tempted to employ as counsel in one court a man who may be his judge in another court.^{28.}

It was further pointed out that the County Courts were expensive and inefficient, and that the poor man with a small case found it difficult to get justice. It was recommended that the County Court be abolished, and that there be substituted a court of wider jurisdiction, with a well paid judge who could command the respect of the people and the confidence of the Bar. It was suggested also that such troublesome routine matters as the probate of wills, the opening of roads, and the settlement of accounts be placed under the jurisdiction of the county clerks.^{29.}

Such was the condition of the County Court when a Constitutional Convention met in 1901. It was almost inevitable that the court would be abolished, and the judiciary committee, in its report, recommended abolition. It was proposed to increase the number of Circuit Courts from sixteen to twenty-four, with an arrangement that would permit a court to be held in each county at least every two months. Mr. W. G. Robertson of Roanoke proposed an amendment which was designed to restore

28. Ibid., p. 235.

29. Ibid., p. 244.

the County Court.³⁰ There was little to be said in favor of the court; the defense was based almost entirely upon the advantages of the historic monthly meeting.³¹

Mr. Robertson said that he did not advocate retaining the old system, but took the position that there was a need for some kind of court, in counties, which would meet every month. Simply because a thing was in the Underwood Constitution, he continued, was no reason that it had to be done away with; if that Constitution had done nothing else of value, it had done a good service in preserving a monthly court. He confessed that a feeling of sentiment was mingled in his desire to retain the County Court, but pointed out that, after all, sentiment was a fact in human nature, and that, in this case, it was mingled with two hundred and fifty years of the customs and habits of the people.³²

Mr. Robertson went on to praise the court as a social and educational institution - as a place where the people could get acquainted, settle accounts, discuss politics, and pay taxes. He believed that the people really wanted a County Court.³³ But when he got around to the purely judicial features of the court, Mr. Robertson was on less firm ground. The best he could do was suggest that people were deriving their opinion of the County Court too much from the conditions that had existed

30. Proceedings and Debates of the Constitutional Convention, 1901-1902, p. 1313.

31. Ibid., p. 1314, et seq.

32. Ibid., pp. 1314-1315.

33. Ibid., p. 1316.

during Readjuster days; many noble and capable men were County Court judges.³⁴ But he had to admit that many of those judges were not learned in the law, and that a number of them were heads of political rings.³⁵ He had to admit that judges should not practice law, but he blamed this, reasonably enough, on the conspicuously inadequate salaries. The whole argument against the courts, he said, narrowed down to the fact that the state thought it couldn't pay the judges enough.³⁶

Another argument presented by Mr. Robertson was his belief that twenty-four Circuit Court judges would be unable to take over, in addition to their own work, the vast jurisdiction that had been handled by the County Courts. There was nothing in the committee report to indicate that a judge could possibly make more than three or four circuits in a year with the amount of work he would have to do.³⁷ The possibility of a substantial salary increase would be a great temptation for a judge to say that he could assume more duties, when his capacity really did not permit it.³⁸

A vigorous attack on the County Court system was led by Mr. Eugene Withers of Danville. Mr. Withers said he knew that in earlier days the court had been made up of eminent country gentlemen; he knew that its decisions had been reversed less often than those of the Circuit Court

³⁴. Ibid., p. 1321.

³⁵. Ibid.

³⁶. Ibid., p. 1322. It is probable that the saving of money was only a minor consideration. See R. C. McDanel, The Virginia Constitutional Convention of 1901-02 (Johns Hopkins University Studies in Historical and Political Science, Vol. XLVI, No. 3), p. 106.

³⁷. Debates, 1901-02, pp. 1323-24.

³⁸. Ibid., p. 1319.

itself; and he appreciated the respect which others had for tradition.³⁹ But to speak of the present County Court was not to speak of the past in which the people took so much pride. The system was really one that had been born in the turmoil of reconstruction; established under Federal protection, it was copied after the system used in New York (and that state had since repudiated it). The attack then was to be against a New York, and not a Virginia, institution.⁴⁰

Mr. Withers confessed that perhaps the County Court still had valuable social and educational aspects, but he maintained that no court had a right to exist simply because it was a social institution. There should be some other specific means by which the people could assemble for pastime and recreation.⁴¹

The gentlemen from Danville pointed out further that he knew of no incompetency or corruption among the individual judges, and that he had never used that as a reason for abolition. But as long as a court system is one which, in itself has no check on such abuses, it ought to be abolished. The fact that the system worked as well as it did was a tribute to the personnel.⁴² In direct reply to Mr. Robertson, he denied that the County Court was any longer so dearly cherished by the people. If the people really wanted such a court, then more than three small and widely separated counties would have passed re-

39. Ibid., p. 1328.

40. Ibid., pp. 1330.

41. Ibid.

42. Ibid., pp. 1330-1331.

solutions asking for its retention.⁴³.

Mr. Withers next undertook to present three specific criticisms of the county court system. In the first place, because of the manner in which elections were held, the representative from the county virtually selected the county judge. The judge thus became dependent on the favor of his representative for the continuance of his judicial life. Secondly, in order that a judge might live, he had to be permitted to practice law. Only an evil system could allow such a situation. In addition to being learned and honest, a judge should be independent of anyone for a living; he must be beyond any suspicion. The third and final objection was that a judge was easily enabled to become the political leader of a courthouse ring; he was too closely connected with appointive powers.⁴⁴.

Again turning to a refutation of Mr. Robertson's argument, Mr. Withers said that according to the committee's distracting plan, every county in the Commonwealth would be assured of at least a bimonthly term. The system was to have added flexibility in that a city judge might do circuit duty when necessary. The Convention had no right to make a constitutional provision for a court every month in every county; that matter should be left to the legislature and to the people in the individual counties.⁴⁵.

There was considerable further debate, centered pri-

43. Ibid., p. 1331. The counties of Appomattox, Fluvanna, Carroll.

44. Ibid., pp. 1332-1334.

45. Ibid., p. 1334.

marily about the question of whether twenty-four circuit judges and twenty city judges would be adequate to deal with all the business that might arise. Considerable evidence was produced to indicate that no difficulty would be encountered.^{46.}

In the course of the argument it was also brought out that the County Court system might have social and educational disadvantages as well as advantages. It was held that it exposed young people to the influence of the bar room; and that it interfered with labor, since negroes and idlers always let court day serve as an opportunity to stop work.^{47.} Mr. Hunton of Fauquier said he recognized the sentimental attachment which many had for the old County Courts, and he could understand the regret with which they would part with so venerable an institution. But, as he pointed out, the sentiment was not universal. The necessity for assemblage was no longer so great - the crowds on court days were growing thinner.irate farmers were complaining when their laborers quit work to go to town every time a court was held.^{48.}

It was said that a County Court, gathering the people together every month, was no longer essential in view of changed industrial and social conditions. The means of spreading knowledge had so greatly improved, that the court was no longer a necessity to any but those "... who go there

46. Ibid., pp. 1335-1339, 1429, 1442.

47. Ibid., p. 1432.

48. Ibid., p. 1437.

to drink or spree or to swap horses or tell anecdotes, or to do nothing, perhaps, but spend a day in idleness...." 49. The rural free delivery, the telephone, the telegraph, the railroad, the multitude of periodicals and newspapers - all had served to make the court an outmoded means of disseminating information.⁵⁰

The outcome of the debates was never in doubt. The County Court perished. "The court had degenerated, had fallen from its former high estate, and its abolition was a necessary step in the political regeneration of Virginia."⁵¹

One writer has said that the abolition of the County Court "... brought an end to the old picturesque court days, when the citizens of the country-side met to swap horses, or yarns, to discuss crops and politics, and to hear the latest speeches of their political representatives, or of those who aspired to office."⁵² The statement is not altogether true. In the first place, the Constitution made it possible for a court to be held in each county every two months, and this is still done in most localities. In the second place, it was provided that the county board of supervisors meet at stated periods to transact their business. There has developed a widespread custom of holding a regular court one month and a supervisor's court the next, so that the system of monthly meetings remains intact. In some places the people still flock to the county

49. Ibid., p. 1441.

50. Ibid.

51. McDanel, The Virginia Convention of 1901-1902, p. 106.

52. Morton, Virginia Since 1861, p. 325.

seat when court is in session. In the numerous counties where court day has ceased to flourish, the abolition of the County Court can not be held responsible.⁵³.

The essential fact is that the monthly gathering, on court day has ceased to be an element of much consequence in the lives of the people. The modern farmer, with his scientific methods and his mechanized equipment, has considerable leisure time to devote to his agricultural journals, to his daily newspapers, and to his radio. In the words of William Allen White, "The farmer cut off his beard when he began to crank his Ford."

⁵³. McDanel, The Virginia Convention of 1901-1902, p. 106.

Bibliography:

- Chitwood, O. P., "Justice in Colonial Virginia," Johns Hopkins University Studies in Historical and Political Science, Vol. XXIII, No. 7-8. Johns Hopkins University, Baltimore, 1905.
- Ingle, Edward, "Local Institutions of Virginia." Johns Hopkins University Studies in Historical and Political Science, Vol. III, No. 2-3. Johns Hopkins University, Baltimore, 1885.
- McMillen, Margaret, The County Courts of Colonial Virginia. Indiana University, 1935.
- Conrad, Holmes, "The Old County Court System of Virginia: Its Place in History." Virginia State Bar Association Report for 1908, pp. 323-350. Richmond, 1908.
- Harrison, J. P., "Suggested Changes in Our Judicial System." Virginia State Bar Association Report for 1899, pp. 233-249. Richmond, 1899.
- Kean, R. G. H., "Our Judicial System: Some of its History and Some of its Defects." Virginia State Bar Association Report for 1889, pp. 136-161. Richmond, 1889.
- Staples, W. R., An Address before the Virginia State Bar Association, July 10, 11, 12, 1894. Virginia State Bar Association Report for 1894, pp. 127-156. Richmond, 1894.
- Brenaman, J. N., A History of Virginia Conventions. J. L. Hill Printing Company, Richmond, 1902.
- McDanel, R. C., The Virginia Constitutional Convention of 1901-1902 (Johns Hopkins University Studies in Historical and Political Science, Vol. XLVI, No. 3). Johns Hopkins University, Baltimore, 1928.
- McDonald, J. J., Life In Old Virginia. Old Virginia Publishing Company, Norfolk, 1907.
- Morton, R. L., Virginia Since 1861 (History of Virginia, Vol. III). American Historical Society, Chicago and New York, 1924.
- Swem, E. G., "A Bibliography of the Conventions and Constitutions of Virginia, including References to Essays, Letters, and Speeches in Virginia Newspapers," Virginia State Library Bulletin, Vol. III, No. 4 (October 1910), pp. 355-441.

Bibliography Con'td.

Thorpe, F. N., ed., The Federal and State Constitutions, Colonial Charters, and Other Organic Laws of the States, Territories, and Colonies Now or Heretofore Forming the United States of America. 7 vols. Government Printing Office, Washington, 1909.

Proceedings and Debates of the Virginia State Convention of 1829-1830. 2 vols. Richmond, 1830.

Proceedings of the Constitutional Convention of 1850-51. Richmond, 1851.

Journal of the Acts and Proceedings of a General Convention... 1861. Richmond 1861.

Proceedings and Debates of the Constitutional Convention, 1901-1902. 2 vol. Richmond, 1906.

The Revised Code of the Law of Virginia, Richmond, 1819.
The Code of Virginia, 1873.